

SUPREME COURT, U. S.

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In the

Supreme Court of the United States

October Term, 1966

No. 1004

ARDEN FARMS CO., a Delaware corporation, and DAMASCUS MILK COMPANY, d/b/a CARNATION COMPANY, an Oregon corporation,
Appellants,

vs.

STATE DEPARTMENT OF AGRICULTURE, J. F. SHORT and KENNETH F. SAWYER,
Appellees.

On Appeal from the Supreme Court of the State of Oregon

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS

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Appellees' motion should be denied.

a. Appellees do not deny that the purpose and effect of the regulation are exactly as appellants describe them. While their motion is based on the statement of the court below that the regulation will encourage interstate milk imports (Jur St 22-23), they do not try to explain or support that statement, either from the record or otherwise,[1] nor do they dispute any part of appellants' showing to the contrary. Instead, they contend that it

1. The contention that a regulation which sharply increases the cost of using imported milk will improve the interstate market is one which reasonably requires some explanation (see Jur St 8-9, 43-50).

is a construction of the regulation and a finding of fact which this Court will not review. In fact, it is neither.

The construction of the regulation is not in issue, nor did it play any part in the decision of the court below.[2] Everybody agrees that the regulation requires a processor who uses pool and nonpool milk to report as Class 1 use of pool milk such proportion of pool deliveries as equals his plant ratio of Class 1 use, whether or not Oregon producers have supplied that amount of his Class 1 sales (see Jur St 21-22; Mot 2-3; Exh 10). The issue is whether the regulation, which appellees do not deny was adopted to protect local producers and increases the cost of using milk purchased from others to a point which virtually eliminates them from the Oregon market, can be sustained under the Commerce Clause.

Nor is the statement of the court below a "finding" that this Court must or should accept. It did not resolve conflicting evidence or inferences,[3] but was based on what the court described as an "economic fact of life" and an assumption about appellees' market pool which they do not deny is wholly erroneous (see Jur St 8,

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2. Appellants obviously disagree with much of the opinion of the court below. They do not, however, disagree with its description of the regulation, and appellees refer to nothing suggesting that they do (Mot 4-5).

3. The facts were all stipulated (Jur St 33). In *Fry Roofing Co. v. Wood*, (1952) 344 US 157 at 160-166, reh den (1953) 345 US 913, relied on by appellees, the state court found, on conflicting evidence, that certain truck lease arrangements were sham. No such issue is presented by this case.

22-23). This appeal asserts a claim of constitutional right, and the Court must review the basis in the record of the lower court's decision to determine if that claim is valid, without regard to labels.

> "* * * If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. * * *" *Truax v. Corrigan,* (1921) 257 US 312 at 324

b. The record shows, and appellees do not deny, that the regulation requires Oregon producers to be paid for Class 1 use of out-of-state milk, and that, as the court below stated, it is its exact purpose to protect the local producer from such use (Jur St 25). This wholly contradicts appellees' denial that the regulation is "an artificial protective device for local producers" (Mot 8). Like the Florida regulation which this Court held invalid in *Polar Co. v. Andrews* (1964) 375 US 361, it does not exclude out-of-state milk, but protects the domestic market for Oregon producers through indirect demands on processors. It is, we suggest, a "not too subtle device" to avoid the requirements of the Commerce Clause (see Mot 8).

CONCLUSION

The questions presented by the appeal are substantial, and appellees' motion should be denied.

Respectfully submitted,

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March 1, 1967